



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998 CASE NO 1055/1/1/05

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (“the Rules”), the Registrar gives notice of the receipt of an appeal, lodged on 4 November 2005, under section 46 of the Competition Act 1998 (“the Act”) by MasterCard International Incorporated (“MCI”) of 2000 Purchase Street, Purchase, New York 10577-2509, United States of America, and MasterCard Europe Sprl (“MCE”) of Chaussée de Tervuren 198A, B-1410 Waterloo, Belgium (referred to collectively as “the appellants”), against a decision (CA98/5/05)¹ taken by the Office of Fair Trading (“the OFT”) on 6 September 2005 (“the decision”).

The decision relates to the operation of the MasterCard consumer credit and chargecard scheme for intra-country transactions in the United Kingdom in the period from 1 March 2000 until 18 November 2004 (“the Scheme”). In particular, the decision relates to the arrangements for setting the multilateral interchange fees (“MIF”) which are payable between acquiring and issuing banks on UK domestic MasterCard credit and charge card transactions in the absence of any bilateral agreements between the banks. The arrangements are referred to as the “MMF MIF” and were set out in the UK Domestic Rules of the MMF. The relevant rules together comprised the “MMF MIF Agreement”. The MMF MIF Agreement is no longer in force.

In the decision the OFT concluded that the MMF MIF Agreement restricted competition within the meaning of Article 81(1) of the EC Treaty and section 2 of the Act (referred to collectively as “Article 81(1)”), and did not meet the exemption conditions set out in Article 81(3) of the EC Treaty and section 9 of the Act (referred to collectively as “Article 81(3)”).

The appellants appeal against that decision on the following grounds:

1. the OFT wrongly redefines the product that the Scheme provides to merchants as being a mere payment transmission mechanism (something akin to or even more limited than a debit card) rather than a credit card, i.e. a product with a credit facility.
2. the OFT wrongfully divides the Scheme into three separate sets of services – acquiring, wholesale and issuing – and wrongly defines relevant markets by reference to these services.
3. the OFT wrongly concludes that, in relation to merchants, the Scheme is not subject to competitive constraints from any other payment methods (including other credit cards, debit cards, cash and cheques) and, in relation to cardholders, the Scheme is only subject to competitive constraints from branded consumer credit and charge cards.
4. the OFT’s analysis of the MMF MIF Agreement is based on certain incorrect and unsubstantiated assumptions about the economics of “payment card” schemes.
5. the OFT fails to understand the “honour all cards” rule and the role that it plays in the effective operation of a four-party credit card scheme.

¹ The text of the decision can be found at: <http://www.offt.gov.uk/NR/rdonlyres/E0CDB5F8-3ECC-462A-9D73-FDEC47ACEDA2/0/mastercard.pdf>.

6. the OFT fails to understand the operation of the Scheme Rules and therefore how the Scheme would have operated in the absence of the MMF MIF.
7. the OFT fails to demonstrate that the MMF MIF constitutes a restriction of competition.
8. if, to the contrary, the MMF MIF is judged to be capable of being a restriction, the OFT has offered no evidence of the magnitude of its impact or considered whether this would be appreciable.
9. even if the MMF MIF is a restriction, because it applies the wrong legal test to the wrong scheme, the OFT erroneously concludes that the MMF MIF is not objectively necessary for the performance of a lawful objective.
10. whichever legal test is applied, the evidence clearly demonstrates that the MMF MIF is objectively necessary.
11. the OFT's conclusions on exemption in relation to the "collective price restriction" result from its incorrect conclusion that an interchange fee set by reference to both payment transmission costs and so-called extraneous costs is a greater restriction of competition than one set by reference to payment transmission costs alone.
12. in its analysis of exemption, the OFT fails to consider the pro-competitive advantages that arise from allowing MasterCard to allocate costs between acquirers and issuers (and hence merchants and cardholders) by reference to the same considerations taken into account by its competitors.
13. the OFT is in error in finding that there is an "extraneous costs restriction" arising from the inclusion of "extraneous costs" in the MMF MIF.
14. the OFT's conclusions about the possible effects on competition of the "extraneous cost restriction" are flawed and the OFT has offered no evidence of the alleged magnitude of the so-called restriction and whether this would be appreciable.

The appellants seek:

- (a) an order setting aside the entire decision;
- (b) a declaration that the MMF MIF is not a restriction and is objectively necessary, so that Article 81 does not apply;
- (c) alternatively to (b), a declaration that the MMF MIF does qualify for exemption under Article 81(3).

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be

contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa

Registrar

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